INDRAN & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Peh Swee Chin J.) September 19, 1984]

[Seremban – Criminal Appeal No. 87 of 1983]

Criminal Law & Procedure – Order for committal for trial before High Court – Whether appealable.

The present appeal raised the question whether an order made by the learned Magistrate, Port Dickson on December 5, 1983 whereby the appellants herein were committed for trial before the High Court was appealable. The learned Magistrate held it was not appealable and he relied on *Kang Yeong Siew* v. *Public Prosecutor.*[1]

Held: as the learned Magistrate could have no power to acquit or convict the appellants, his order of committal for trial, not being a final order, is therefore not appealable.

Cases referred to :

(1) *Kang Yeong Siew* v. *Public Prosecutor* (1928) 6 F.M.S.L.R. 139.
(2) *Public Prosecutor* v. *Ng Goh Weng* [1979] 1 M.L.J. 127.
(3) *Re Osman bin Abdullah* [1954] M.L.J. 237.
(4) *R.* v. *Retnam* [1934] M.L.J. 6.
(5) *Goh Swee Joo* v. *Public Prosecutor* [1962] M.L.J. 29.
(6) *Cheak Yoke Thong* v. *Public Prosecutor* [1984] 1 M.L.J. 311.

CRIMINAL APPEAL.

J. Nadchatiram for the appellants.

Mohamed Zaki bin Mohamed Yasin (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Peh Swee Chin J.: This appeal raises the question whether an order made by the learned Magistrate, Port Dickson on December 5, 1983 whereby the appellants herein were committed for trial on a tentative charge of murder before the High Court, Seremban, together with two other persons who have not appealed from it, is appealable.

The learned Magistrate in his grounds of decision, was of the view that such an order for committal for trial before the High Court was not appealable and he relied on *Kang Yeong Siew* v. *Public Prosecutor*[1].

Learned counsel for the appellants argued that such an order was appealable and as a principal ground of appeal, that the evidence adduced at the preliminary enquiry did not make out sufficient grounds for committing the appellants for trial.

In *Kang Yeong Siew's case*, the same point as to whether an order of committal for trial before the High Court was appealable or not came up for consideration, and Thorne, J., reviewed and considered relevant provisions of the then Criminal Procedure Code, notably its section 305 which is *in pari materia* with the somewhat extended section 307 of the present Criminal Procedure Code (such extension being of no consequence for the purpose of the present appeal). The same operative words repeated in the present section 307 as contained in the previous section 305 are :-

> ".... any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the Court of a Judge against such judgment, sentence or order ..."

The learned Judge took into account, *inter alia*, the power (present in both the previous and the present Criminal Procedure Code) of the Public Prosecutor to direct that an accused already so committed for trial be discharged, or to alter, withdraw or frame an additional charge or charges against such an accused, without any right of appeal lying against such an order of the Public Prosecutor. His Lordship there then held the order of committal for trial was non-appealable and dismissed the appeal before him.

Learned counsel submitted to the effect that the decision in *Kang's case* was wrong and that order for committal was within the meaning of the "order" referred to in section 307 aforesaid. He cited the cases of *Public Prosecutor* v. *Ng Goh Weng*[2], *Re Osman bin Abdullah*[3], and *R.* v. *Retnam*[4], in support of his contention.

The cases cited do not go to the root of the problem but merely scratch the surface dealing as they did, with revision of orders of committal for trial of Magistrates, but never with an appeal from any of such orders. If anything these cited cases indicate such an appeal as a problem area into which, since *Kang Yeong Siew's case*, none has ventured until now.

The learned Deputy, argued, similarly relying on *Kang's case*, and in addition thereto, submitted that if the learned Magistrate had discharged the appellants at the end of the preliminary enquiry, the order of discharge would not have amounted to an acquittal, and the Public Prosecutor would equally have no right of appeal from it. He cited also the case of *Goh Swee Joo* v. *Public Prosecutor*[5], in which the applicant applied for a preliminary

enquiry to be transferred to another magistrate. In dismissing the application, the learned Judge then held that the duty of a magistrate being to find whether there was a case for committal to the High Court, it could not be said that the liberty of the accused was in jeopardy.

The answer to this question lies with the meaning of the words "... judgment, sentence or order", especially the word "order" against which a party may prefer an appeal. Thorne, J. had very clearly and correctly given the word a restricted meaning but his Lordship did so on the ground of certain inconclusiveness of the order of committal for trial as explained by him, but in my view, with respect, the real rationale for such a restricted meaning was pin-pointed by Hashim Yeop A. Sani, F.J. in the very recent case of *Cheak Yoke Thong* v. *Public Prosecutor*[6], in which the same word in the same section came up for judicial interpretation. His Lordship applied the maxim of *ejusdem generis* and construed the word "order" with the immediately preceding words of "judgment" and "sentence" and held that the word "order" should therefore mean an order that should finally dispose of the rights of the parties. His Lordship further held that the order of the lower court refusing to disqualify itself on the ground of likelihood of bias was not appealable. Here in the instant appeal, the learned Magistrate could have no power to acquit or convict the appellants, his order of committal for trial, not being such a final order, is therefore not appealable. Having so decided, it is not necessary to go into the evidence to ascertain whether there were sufficient grounds for committing the applicants for trial in connection with the allegedly tragic death of a young unmarried girl said to have been raped, dumped near a rubbish dump and then burnt in what appears to be a most heinous crime.

The appeal is dismissed and the order of committal for trial in question is therefore confirmed.

Appeal dismissed

Solicitors: *Jegadevan Nadchatiram.*

SARASWATEE D/O ARUMUGAN & ANOR. v. TAN CHONG & MOTORS CO. SDN. BHD.

[A.C.J. (Wan Hamzah J.) December 31, 1984]
[Kuala Lumpur – Civil Appeal No. 36 of 1982]

Practice & Procedure – Pleadings – Both counsel conceded pleadings not properly drawn – Whether on appeal both counsel could submit agreed list of issues to replace pleadings.

Evidence – Submission of agreed list of issues to replace pleading on appeal – Whether proper evidence.

In this case the appellant claimed damages for alleged breach by the defendants of a hire-purchase agreement. The issues in the case had not been set out clearly and completely by both parties in their pleadings but the learned Magistrate proceeded to try the case and gave judgment for the plaintiff. The defendants appealed. On appeal both counsel for the plaintiffs and defendants informed the court that they were in agreement that the pleadings had not been properly drawn and submitted an agreed list of issues, none of which had been raised in the pleadings to replace the pleadings.

Held: it was not possible to make a fair and just determination of these issues and to give a correct judgment in the case without proper evidence before the court because at the trial these issues had not been placed before the Magistrate. In the premise therefore it could not be said that the minds of the parties and the Magistrate were directed to these issues at the time when evidence was tendered and admitted. In order that justice be done, the real issues should first be set out clearly and a fresh trial of the case ordered before another Magistrate.

CIVIL SUIT.

S. Sothi for the appellants/defendants.
Evelyn Wan for the respondent/plaintiff.

Cur. Adv. Vult.

Wan Hamzah J.: In the Kuala Lumpur Magistrate's Court Civil Action No. 10046/1979 the Plaintiff claimed damages for alleged breach by the Defendants of a hire-purchase agreement. No particulars of the hire-purchase agreement or of the alleged breach were stated in the Statement of Claim and the record does not show that the Defendants asked for particulars. But they proceeded to file Statement of Defence and Counterclaim, in which they made certain allegations from which it appears that they tried to plead that there was no contract whereby they were bound to buy a car from the Plaintiff. But in spite of that they contended that the Plaintiff wrongly repudiated "the whole terms of the agreement" as if there had been a contract between the parties, and the Defendants stated this contention without stating that it was pleaded as an alternative to the other contention.